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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENNEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION, *Petitioners*

against

CIVIL AERONAUTICS BOARD

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO LTD.; GATEWAY TRANSPORTATION CO., INC.; and GATEWAY AVIATION, INC., *Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION FOR THE RESPONDENTS CF AIR FREIGHT, INC., CONSOLIDATED FREIGHTWAYS, INC., P.I.E. AIR FREIGHT FORWARDING, INC., AND PACIFIC INTERMOUNTAIN EXPRESS CO.

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### OPINIONS BELOW

The opinion of the Court of Appeals (Appendix of Petition, 1-14) is not yet reported. The earlier opinion of the Court of Appeals (App. 91-116) is reported at 391 F. 2d 295. The findings and orders of the Civil Aeronautics Board (App. 15-90 and 117-201) are not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1969. The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The questions presented are set forth in the Petition, as follows:

"1. Whether the Court's decision allowing the Board to authorize long-haul motor carriers as air freight forwarders violated Congressional policy as evidenced in the Federal Aviation Act of 1958 and elsewhere.

"2. Whether the Court below deprived Petitioners of their rights to judicial review of the Board's Order and Regulations, contrary to 49 U.S.C. § 1486.

"3. Whether the Court's decision violated the Administrative Procedure Act, 5 U.S.C. § 557(c), by allowing the Board to substitute a so-called "experiment" for the findings, conclusions and reasons required by the Act, or otherwise."

## STATUTES INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, as amended (the "Act"), the Administrative Procedure Act, and the regulations of the Civil Aeronautics Board are set forth in the Appendix to the Petition for Certiorari, at pages 202-212.

In addition, 49 U.S.C. 1371 (d) (1) (§ 401 (d) (1) of the Act) provides:

> (d) (1) The Board shall issue a certificate authorizing the whole or any part of the transporta-

tion covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

## STATEMENT

Administrative proceedings were instituted by the Civil Aeronautics Board (the "Board") on January 12, 1966, by Order E-23117, consolidating for hearing the pending applications filed by four long-haul motor carriers for air forwarding licenses.[1] Although the Board from time to time had previously authorized numerous motor carriers and other surface carriers, or affiliates thereof, to engage in air transportation as air freight forwarders, the Board had never had occasion to consider applications for such authority from long-haul truckers. The Board, therefore, included in the proceeding a comprehensive investigation "to fully explore the possible consequences of allowing motor carriers, such as applicants, to be air freight forwarders * * * ". The Board also later stated, in its first opinion in the proceeding, that "Our purpose in instituting this investigation was to determine whether our traditional restrictions on surface car-

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[1] The Board's order of investigation did not define long-haul carriers. However, proposed regulations issued by the Board at the conclusion of the proceeding define the term "long-haul motor carrier" to mean "a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate of such a carrier." (App. 73).

riers have become outmoded for motor carriers like the applicants."[2] (App. 122).

Although the Board's first opinion and order in the proceeding granted only four new air forwarder licenses, the opinion also contained findings, stemming from the investigative phase of the proceeding, concerning the entry of motor carriers generally into the field of air freight forwarding. On review, therefore, the Court of Appeals remanded the proceeding to the Board, finding that the "most serious deficiency" in the first decision of the Board was its ambiguity as to "whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it, and the inadequacy of its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect." 391 F. 2d 295, 298 (App. 97).

On remand the Board, after reargument and reconsideration, issued its opinion and order granting air freight forwarder authorizations to three applicants,[3] and making it clear that its action was so limited. The Board's opinion is explicit on this point:

> "Reviewing the record in the light of the Court's opinion, the Board believes that it can and should

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[2] In the case of applicants other than surface carriers or aviation enterprises, or their affiliates, the Board has always followed a policy of "free entry" into air freight forwarding. Such other applicants are not required to show public need for additional service, but are granted operating authority if they can meet minimum insurance and similar requirements. *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), 500-501.

[3] The application of D.C. International, Inc., the fourth application embraced in the first decision, was dismissed by the Board in its Order on the ground that intervening events had made the application moot. (App. 42-43).

> grant authority to the three applicants who received awards before (footnote omitted). In brief, the Board finds that those applicants' authorizations will result in substantial public benefits, will not result in conflicts of interest which will interfere with the promotion of air cargo, and will not reduce effective competition by the existing air forwarding industry." (App. 17).

Again, in order to underscore its holding, the Board said:

> "The Board emphasizes, however, that it is granting only the applications before it and not passing upon any others." (App. 17).

With respect to the issues involved in the investigative phase of the proceeding the Board stated as follows:

> "For other applicants, the Board tentatively concludes only that it should not deem the size, geographical extent, or general commodity rights of a trucker's surface operations or authority—of themselves—as factors showing that the trucker should be barred from the air freight forwarding business. But long-haul truckers of general commodities will not be granted air forwarding licenses routinely. Instead, each trucker applicant will be required to show that it will conscientiously promote air cargo and that its operations, either alone or in combination with others already licensed, will be in the public interest. The Board will not be satisfied with mere recitations; it will scrutinize each application (and any objection) to insure that these criteria are met. And the Board will maintain a close watch over the experiment through new and more detailed reporting requirements. As a final safeguard, the Board will reserve the power to suspend the processing of new applications and, if necessary, even to terminate outstanding licenses.

> This policy is being codified in proposed regulations issued concurrently with this order. For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry." (App. 17-18).

Thus it is clear that the Board took two separate but related actions. *First,* acting on the applications consolidated in the proceeding, the Board by order granted three applications for forwarder authority. *Second,* taking cognizance of the investigative phase of the proceeding, it tentatively concluded that there should be no absolute bar *against* long-haul truckers, and issued a Notice of Proposed Rule-Making setting forth proposed standards and procedures for the future grant or denial of applications from such truckers. As a result, additional applications can and will be considered by the Board.

As to the three applications it granted, the Board concluded that the applicants had made a strong and particularized showing that their entry into the air freight forwarding business "is likely to produce important public benefits" (App. 24). The Board, reviewing the relevant data, concluded that (1) the air freight industry was lagging seriously and that there was "a demonstrated need for new, able, and well-financed enterprises to enter the air forwarding business" (App. 25-27); that (2) experience had shown that "for many years, few large independents have asked to become forwarders, so that "[i]f the Board spurns the trucking-related applicants now, it will be left with nothing better than the bare hope that other applicants, equally qualified but without long-haul surface connections, will emerge someday" (App. 27); and that (3) the three applicants, in view of their

financial, managerial, and operational resources, "will be a potent force in developing new air freight" both in existing markets and also in the smaller, "less productive cities" where the applicants intend to establish operations (App. 28-29).

The Board also considered in detail the question of impact of the three new authorizations upon the air forwarder industry. It concluded that, in view of the demonstrated growth and ever-increasing potential of the air freight market, entry of these three applicants would not undermine the overwhelming majority of forwarders but rather "will stimulate so much new freight that they will contribute to the existing forwarders' continued growth" (App. 36-39); that as to those "small companies [which] have begun forwarding businesses which are ill-conceived, inadequately financed, and poorly managed . . . it makes no difference whether competition comes from the applicants or from the many large independent forwarders" (App. 39-40); that, in short, the "case for protection is far more speculative than the case for competition" and that "competition is also the preferred statutory goal" (App. 40); and that there is "no reason to believe that air forwarding will be inundated by long-haul truckers and railroads" both because of the fact that so few have applied and because the Board's monitored-entry policy will be selective as to those truckers who can qualify to become forwarders" (App. 40). Finally, on the question of conflicts of interest with their surface operations, the Board found that on the evidence of record the applicants had demonstrated that the conflict of interest theory should not be a bar because, in a variety of ways stated in detail in the opinion, they would establish separate air freight

operations devoted exclusively to that service, because air freight is in large part small-package freight and such freight is not very attractive to motor carriers, because the experience of those surface carriers now in air forwarding "teach[es] some skepticism" about "whether the conflict of interest hypothesis has any remaining vigor for truckers . . . like the three applicants," and because in any event the Board will closely supervise this "controlled experiment." The Board concluded:

> "The time has come, the Board believes, to test the conflicts hypothesis in a controlled experiment. Each applicant has given persuasive evidence of its intention to promote air cargo. Each has offered a different organizational plan to guard against conflicts in the related surface operation. Only experience can verify or disprove the applicants' promise, or indicate whether one's organizational format is sounder than another's. During the experimental period, the Board will receive from the applicants special reports showing whether the applicants are stimulating new off-line business, increasing traffic from outside present terminal areas, and receiving new traffic from their surface divisions or affiliates. That information will enable the Board to answer the conflicts question on the basis of fact, not surmise." (App. 35-36).

On review of the Board's second opinion and order, the Court below dismissed the petition for review insofar as it related to the Notice for Rule-Making. The Court held that review was premature, since the proposed regulations had not yet been adopted, but that even if they had been, Petitioners will be affected by the regulations, and therefore have standing to chal-

lenge them, "only when, as and if the Board grants further authorizations to long-haul truckers under them." (App. 12).

The petition to review the three new air forwarder authorizations was denied. The Court recognized that the Board was granting only the three applications before it, thus resolving the ambiguity found in the Board's first opinion. On the question of the policy concerning surface carrier participation in air freight forwarding, the Court held that "the Board did not deny that it must consider the bearing of prospective air freight forwarders' involvement in surface transportation, it said only that this should not constitute a bar." (App. 10). The Court, noting that the Board had satisfied itself that a proper showing had been made on this issue by the applicants, accepted the Board determination of this issue. (App. 10).

## REASONS FOR DENYING THE WRIT

Petitioners do not claim, nor could they, that the decision below conflicts with that of any other court. Indeed, they do not even identify any statutory provision that they urge has been misconstrued. In the end, their petition amounts simply to a plea that this Court review the Board's judgment as to issues of transportation policy. Such a plea has no place in any court, much less is it a basis for invocation of this Court's power of discretionary review.

1. Petitioners concede that the Board was not precluded by any statute from issuing freight forwarder certificates to applicants. Licenses to engage in air transportation as air freight forwarders are issued by the Board under familiar standards of public interest

as defined in section 102 of the Act.[4] It is true, as Petitioners point out, that in cases of acquisitions by common carriers of air carriers, section 408 imposes requirements more stringent than the general public interest and public convenience and necessity standards of section 102;[5] and that the Board has, as a matter of policy, applied those more stringent requirements even where surface carriers were applying for air carrier certificates rather than simply seeking authority to acquire such a carrier. *American President Lines, et al., Petition,* 7 C.A.B. 799 (1947); *National Air Freight Forwarding Corp.* v. *CAB,* 197 F. 2d 384 (D.C. Circ. 1952). Because of the limitations of the second proviso of section 408(b), the consequence has been that as a practical matter surface carriers have been unable to enter the field of air transportation *as direct air carriers operating aircraft.*

At the same time, as petitioners acknowledge (Pet. p. 14), the Board has consistently and repeatedly held that the second proviso of section 408(b) is *not* applicable to applications under section 408 to acquire air

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[4] Air freight forwarders do not themselves operate aircraft in air transportation, but utilize the aircraft operated by other, "direct" air carriers. Air freight forwarders in the terminology of the Act are "indirect" air carriers, and have in fact been licensed exclusively under the exemption provisions of section 101(3) of the Act. "Direct" air carriers, on the other hand, have in most cases been licensed under section 401(d)(1) of the Act.

[5] A proposed acquisition must meet the requirement of "public interest" as defined in section 102 and the anti-monopoly test of the "first proviso" of section 408(b). The most stringent requirement, however, is that of the "second proviso" of section 408(b), which requires a surface carrier applicant under section 408 to show that "the transaction proposed will promote the public interest by enabling * * * [the surface carrier applicant] to use aircraft to public advantage in its operation and will not restrain competition."

freight forwarders, nor is that proviso applicable to applications by surface carriers for licenses to engage in air freight forwarding. *Air Freight Forwarders Case,* 9 C.A.B. 473 (1948), at 502-503. That position was affirmed over 20 years ago by the Court of Appeals for the Seventh Circuit, *American Airlines* v. *C.A.B.,* 178 F. 2d 903, 909 (7th Cir. 1949); was reaffirmed by the court below in the case at bar (App. 7); has never been questioned by any other court in the intervening years; and is not questioned by Petitioners in this case.

2. What Petitioners contend is, not that the Board or the lower court has misconstrued the statute, but that the Board with the approval of the Court has changed its policy. As Petitioners put it, the Board has "for over twenty years . . . applied a *rigid policy of exclusion* against surface carrier invasion of *air freight forwarding*" (Pet. 14). Even were that so, it would not matter. To make and to change policy with the march of events is what the Board is there for, so long as it honors the statute and abides by governing procedural requirements. As this Court aptly said in *American Trucking Ass'ns.* v. *Atchison, Topeka & S. Fe RR,* 387 U.S. 397, 416 (1967):

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

Beyond that, Petitioner's view of past Board policy is, to put it conservatively, greatly overdrawn. In

point of fact, under the Board's standards—although stricter than those applied to ordinary applicants—surface carriers, and particularly motor carriers, have participated in air freight forwarding to a substantial extent.[6] In 1948 in *Air Freight Forwarder Case, supra,* nine surface forwarders, surface forwarder affiliates, and motor carrier affiliates were licensed. A year later, in the international phase of the proceeding, additional surface forwarder and railroad affiliates were licensed. *Air Freight Forwarder Case (International),* 11 C.A.B. 182 (1949). In 1953, acting on an individual application, the Board authorized United Parcel Service, which owned 12 regional general commodity motor carriers operating in a number of states, to acquire an air forwarder. Order E-7324, April 22, 1953. In *Airfreight Forwarder Investigation,* 21 C.A.B. 536 (1955), two railroad affiliates were licensed for domestic air forwarding. In *Airfreight Forwarder Authority Case,* 40 C.A.B. 673 (1964), eight long-haul motor carriers of household goods (or affiliate) were authorized to engage in air forwarding of household goods. The latter case contains a succinct and precise statement of the standard policy applied by the Board in air forwarder cases, as follows:

> "The Board has prohibited entry by surface carriers into the air freight forwarder field where it appeared that such conflicts of interest would arise between air and surface operations as to

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[6] Indeed, in more than twenty years since the first *Forwarder Case* in 1948 the Board has denied only *one* application by a trucker, or affiliate, for an air forwarder license. *Telstar Air Freight, Inc.,* Order E-22479, issued under delegated authority July 27, 1965. The order makes it clear that the staff considered that the applicant failed to meet the conflicts standard applied to surface carriers and quoted in this brief, *infra,* p. 12-13.

result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding." (40 C.A.B. at 765).

In sum, the Board's policy concerning surface carrier participation in air freight forwarding (1) has not been the rigid policy of exclusion which has virtually foreclosed surface carrier participation in direct air transportation, but (2) under the doctrine quoted above from 40 C.A.B. at 765, has required an evaluation of "conflicts of interest" and promotion of air forwarding in the light of the facts of each case. Contrary to Petitioners' contentions, therefore, the Board did not act in a manner contrary to Congressional intent[7] and long-standing administrative construction. Rather, what the Board did was simply to conclude, on the basis of ample evidence and thorough reflection, that application of these principles should not automatically bar long-haul motor carriers from the air freight forwarding field, but that rather, on an experimental basis, each application from such a carrier should be judged on its own facts. As the Court below correctly found, that was a reasonable exercise of the Board's licensing powers under the Act.

3. Petitioners also contend that they were deprived of a right to review of the Board's regulations respecting future air forwarder applications by long-haul motor carriers. The contention is frivolous.

[7] Indeed, Congress has been requested by the air freight forwarders, but has declined to abolish the free entry system for air forwarding. See H.R. 4859, 90th Cong., 1st Sess. (1967); H.R. 4181, 88th Cong., 1st Sess. (1963); Hearings before Subcommittee on Small Business, 89th Cong., 1st Sess. 103-121, 129 (Vol. 1, 1966).

When review was sought, the regulations had not been made effective. Rather, they had been circulated and comments from interested parties had been invited. As the court below said, "Although comments on the proposed regulations were due by May 23, 1969, the Board has not yet acted upon them, and review would thus be premature" (App. 12).[8]

4. Finally, Petitioners contend that the Board did not make adequate findings under Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 557(c). In view of the comprehensive opinion of the Board, this contention is not easy to understand. Evidently the notion is that the Board resorted to "experimentation" in lieu of proper findings. But neither the Board nor the lower court so much as hinted that the Board's "experimental" approach to the problem at hand obviated the need for adequate findings respecting the applications that were granted, and in fact the findings were detailed and exhaustive. Furthermore, the court below has twice reviewed the findings of the Board,

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[8] The regulations were adopted on November 12, 1969, and became effective January 5, 1970. 34 Federal Register 19340-6. It is interesting to note that review was not sought within the statutory period of sixty days after November 12, 1969. Section 1006(a) of the Act, 49 U.S.C. 1486(a). Had review been sought, for reasons outlined by the court below, it would have been unavailing, for these regulations are not the sort of regulations that are the appropriate subject of judicial review. As the Court below pointed out, the regulations "do not compel petitioners to do anything they have not previously done or to refrain from doing anything they were previously permitted to do * * *." (App. 12). They are not faced with the dilemma of incurring injury through compliance, or, on the other hand, risking penalties for non-compliance. Petitioners complain only of possible future competition—issues which can more appropriately be resolved after the general criteria in the regulations have been applied by the Board to further applications for air forwarder licenses.

and Petitioners have failed to show why the lower court's determination respecting the adequacy of the findings should be considered further by this Court.

Petitioners also set forth certain "examples" of findings of the Board and the evidence or lack of evidence supporting them, "merely to shed light on the Board's action, which the Court sanctioned, whereby it * * * substituted 'experimentation' for findings, reasons and evidence required by section 8(b) of the Administrative Procedure Act."[9] Petitioners selected samples related to the evaluation of evidence, and were or should have been presented to the Court below. Moreover, the contentions in the Petition for Certiorari do not correctly, fully or fairly explain the nature of the Board's findings, or the evidence supporting them. No useful purpose would be served by discussing these contentions in detail, but we comment on them briefly in the margin.[10]

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[9] The "examples" are also said to "shed light" on the Board's refusal to apply the Congressional policy and on its resort to "artful devices to avoid review of the issue of competitive impact". We submit that the examples are irrelevant to both issues and shed no light on either of them.

[10] The comments as numbered below correspond to the numbered paragraphs of the Petition at pages 24 through 26:

1. Petitioners grossly misstate the Board's findings concerning overabundance of capacity. The Board considered both all-cargo and passenger aircraft capacity, and found that "even without considering the additional freight capacity of combination aircraft [i.e., aircraft fitted out to carry passengers and freight], air cargo must expand several times to fill the airlines' pressing need for more freight." (App. 25). The precise and detailed findings demanded by Petitioners are unnecessary in light of the tremendous growth in capacity.

2. Petitioners misstate the Board's findings on secondary markets. The Board found only that the three successful applicants have an exceptional ability to stimulate air freight in under-

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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developed cities, and are the most likely candidates to provide needed competition there, because of their financial strength and their ability to utilize their surface facilities at such points. (App. 28-29). Moreover, Order E-25513 cited by Petitioners is not pertinent: the Board was deciding only which domestic points should be consolidated for hearing in a U.S.-Europe air freight investigation.

3. Contrary to Petitioners' contentions, the Board made extensive findings on the issue of conflicts of interest, and reached conclusions which supported the authorization of experimental service. (App. 31-36).

4. Petitioners' point 4 is an astonishing blend of misstated findings and tortured reasoning. A reading of the Board's opinion reveals that none of the findings of fact and reasoning is correctly stated, except the statement that most existing forwarders concentrate services at major points. (App. 24-36).

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1970, copies of the Brief in Opposition for Respondents CF Air Freight, Inc., Consolidated Freightways, Inc., P.I.E. Air Freight Forwarding, Inc., and Pacific Intermountain Express Co., were mailed, postage prepaid, to the following:

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